No. 85-185

Supreme Court, U.S.
FILED
JUL 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUANE WENDALL LARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RAYMOND J. SMITH *
ELLEN G. ROBINSON
BURKE AND SMITH CHARTERED
55 West Monroe Street
Suite 1800
Chicago, Illinois 60603
(312) 853-3230

Attorneys for Petitioner Duane Wendall Larson

Of Counsel:
ALAN M. DERSHOWITZ
LAURA HANFT
Harvard Law School
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4617

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

46 pp

QUESTIONS PRESENTED

I.

Whether the court of appeals erred in holding that a registered hotel guest who has paid for one night and communicated his intent to stay over; who is occupying his assigned room; and who is vigorously asserting his right to privacy, is not protected under the Fourth Amendment as construed in *Rakas v. Illinois* from an unwanted, warrantless police search of his room.

II.

Whether the court of appeals erred in making a factual "finding" of exigent circumstances where the district court made no such finding, the officers did not rely on exigent circumstances, and no exigency existed.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT:	
I.	
THE COURT OF APPEALS ERRED IN HOLDING THAT A REGISTERED HOTEL GUEST WHO HAS PAID FOR ONE NIGHT AND COMMUNICATED HIS INTENT TO STAY OVER; WHO IS OCCUPYING HIS ASSIGNED ROOM; AND WHO IS VIGOROUSLY ASSERTING HIS RIGHT TO PRIVACY, IS NOT PROTECTED UNDER THE FOURTH AMENDMENT AS CONSTRUED IN *RAKAS v. ILLINOIS* FROM AN UNWANTED, WARRANTLESS POLICE SEARCH OF HIS ROOM. THIS HOLDING THREATENS THE PRIVACY RIGHTS OF THE ENTIRE TRAVELING PUBLIC	5
A. A Hotel Room Is The Constitutional Equivalent Of A Home For Police-Search Purposes	6
B. Under *Rakas*, A Guest's Failure To Pre-Pay All Room Charges In Advance Is Not Dispositive Of His Constitutional Rights	7
C. The Court Of Appeals Reduced The *Rakas* Analysis To A Bright-Line Test That Focuses On A Particular Hotel's Policies Instead Of The Reasonableness Of The Privacy Expectations Of Guests	11

II.

THE COURT OF APPEALS ERRED IN MAKING A FACTUAL "FINDING" OF EXIGENT CIRCUMSTANCES WHERE THE DISTRICT COURT MADE NO SUCH FINDING, THE OFFICERS DID NOT RELY ON EXIGENT CIRCUMSTANCES, AND NO EXIGENCY EXISTED .. 13

A. The Police Officers' Actual Belief And Judgment Is Central To The Doctrine Of Exigent Circumstances 15

B. The Police Officers Made No Subjective Judgment Of Exigency 16

C. There Was No Objective Basis For Concluding That An Exigency Existed ... 18

D. When Appellate Judges Substitute Their Speculations For Police Officers' Judgment, The Exigent Circumstances Exception Swallows The Warrant Clause Whole ... 19

CONCLUSION 20

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit ..... App. 1

Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing and Rehearing *en banc* ..... App. 13

Order of the United States Court of Appeals for the Eighth Circuit Affirming the Judgment of the District Court ..... App. 14

Order of the United States District Court for the District of Minnesota, Fourth Division, Denying the Motion to Suppress ..... App. 15

TABLE OF AUTHORITIES

Cases	PAGE
Adams v. Williams, 407 U.S. 143 (1972)	14
Hoffa v. United States, 385 U.S. 293 (1966) ...	7
Illinois v. Gates, 103 S.Ct. 2317 (1983)	14
Johnson v. United States, 333 U.S. 10 (1948)	6, 7, 15, 19, 20
Katz v. United States, 389 U.S. 347 (1967)	10, 15
Lutsig v. United States, 338 U.S. 74 (1949) ...	7
McDonald v. United States, 335 U.S. 451 (1948) ..	15
Michigan v. Clifford, 104 S.Ct. 641 (1984)	6, 10
Mincey v. Arizona, 437 U.S. 385 (1978)	15, 19
New York v. Quarles, 104 S.Ct. 2626 (1985) ...	15, 18
Oliver v. United States, 104 S.Ct. 1735 (1984) ...	10
Payton v. New York, 445 U.S. 537 (1980)	6
Rakas v. Illinois, 439 U.S. 128 (1978)	*passim*
Rawlings v. Kentucky, 448 U.S. 98 (1980)	9, 19
Segura v. United States, 104 S.Ct. 3380 (1984) ..	19
Stoner v. California, 376 U.S. 483 (1964)	7, 17
United States v. Botelho, 360 F.Supp. 620 (D. Hawaii 1973)	9
United States v. Brock, 667 F.2d 1311 (9th Cir. 1982), *cert. denied* 103 S.Ct. 1271 (1983) ...	16
United States v. Croft, 429 F.2d 884 (10th Cir. 1970)	12

United States v. Haddad, 558 F.2d 968 (9th Cir. 1977) 11, 12

United States v. Jeffers, 342 U.S. 48 (1951) ... 7

United States v. Lee, 700 F.2d 424 (10th Cir. 1983), *cert. denied*, 103 S.Ct. 3094 (1983) 12

United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) 7

United States v. Morales, 737 F.2d 761 (8th Cir. 1984) 16

United States v. Parizo, 514 F.2d 52 (2d Cir. 1975) . 11, 12

United States v. Perez, 700 F.2d 1232 (8th Cir. 1983), *cert. denied* 104 S.Ct. 3587 (1984) ... 16

United States v. Sharpe, 105 S.Ct. 1568 (1985) ... 19

United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983), *cert. denied* 104 S.Ct. 1593 (1984) ... 15

United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied* 435 U.S. 944 (1978) 15

Vale v. Louisiana, 399 U.S. 30 (1970) 15

Warden v. Hayden, 387 U.S. 294 (1967) 15

Welsch v. Wisconsin, 104 S.Ct. 2091 (1985) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DUANE WENDALL LARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Duane Wendall Larson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1985, and the order of the United States Court of Appeals for the Eighth Circuit, entered May 31, 1985, denying the petition for rehearing with suggestion of rehearing *en banc.*

OPINIONS BELOW

The opinion of the Court of Appeals, *United States of America v. Larson,* appears at 760 F.2d 852 (1985), and is reproduced in the Appendix hereto at App. 1 through

App. 12. The order on denial of rehearing and rehearing *en banc*, not yet reported, appears in the Appendix at App. 13. The order affirming the judgment of the District Court in accordance with the opinion of the Court of Appeals appears in the Appendix at App. 14. The opinion of the District Court, denying petitioner's Motion to Suppress, appears in the Appendix at App. 15 through App. 17.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1985. A timely petition for rehearing *en banc* was denied on May 31, 1985, with Circuit Judge Theodore McMillian voting to grant *en banc* review, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

This petition concerns the warrantless, non-consensual police search of a motel room which, at the time of the search, was occupied by a paying, registered guest who had been assigned to the room.

Evidence adduced at the hearing on the motion to suppress revealed that about 6:40 p.m., on October 29, 1983, Officers Schlueter and Holden of the City of Burnsville, Minnesota Police Department responded to a report that

an assistant manager for the Howard Johnson Motel in Burnsville had found a "suspicious substance" in one of the rooms.

Upon their arrival, the motel's assistant manager, William Webster, informed them that (1) "it *appeared* that they had a room within the motel that had been vacated;" and (2) "that there was [sic] several bags in the motel room which contained white powder which he [Webster] considered to be a suspicious nature" (emphasis supplied). At that time Webster also told the police that on October 28, 1983, one Sheila Burgess had registered for herself and a male companion and had been assigned to room 124. Webster informed the officers that Burgess left the motel in a taxi the next morning; and that at 2:30 that afternoon a maid had gone to make up the room but was told by a male inside the room that "he did not want service and that he was staying over." Webster then stated that when telephone calls were made about 5:30 p.m. from the room, he first sent the bellman and then inspected the room himself. At 5:45 p.m., Webster entered the room and found brown paper bags containing plastic bags filled with white powder, which he could not identify, some keys and prescription pill bottles. Webster testified that he "wouldn't recognize illegal narcotics if I saw them but I knew it wasn't sugar and I knew it wasn't flour." Webster then called the Burnsville police.

At 7:00 p.m., the Burnsville police officers proceeded to room 124 accompanied by Webster to conduct a search directed to the room and its contents, including the suspicious white powder. Webster inserted his pass key and at the same time knocked on the door. At that time the male occupant, who had returned to the room, answered, "What do you want?" Webster said he was the manager and that he wanted to get paid for the room for the day.

The male occupant answered, "I'll be down to take care of it in a few minutes." Webster agreed, responding, "Okay."

Realizing that the occupant had returned to the room, Officer Holden said, "There was a brief time when quite frankly Schlueter and I looked at each other—kind of like 'what are we going to do now?' " Then Schlueter went up and knocked on the door of room 124 himself. He announced himself as a police officer and asked to talk to the person inside the room, who responded, "Just a minute." Fifteen seconds later petitioner Larson came out of the room and closed the door behind him. Officer Holden asked him for identification and Larson provided his own driver's license. One of the officers also asked to whom the room had been registered, and Larson demonstrated that he was the "other" occupant of the room, (the registration card showed two occupants), correctly naming Sheila Burgess of Lake Crystal, Minnesota, whose name and address appeared on the registration card that Webster had given the police.

Larson then inquired, in effect, "What's this all about? If it's about payment of the room, I already told the manager that I'd come down and pay them." At this point, Officer Schlueter asked Larson for permission to enter room 124. Larson refused. The officer then turned to the motel manager, Donald Peterson, who had just arrived at the room, and in Mr. Peterson's words, "[B]ecause Mr. Larson had said that he would not give permission to enter that room, and then the police officer said, well, that it would come down to the motor lodge manager [Peterson] making the decision," Peterson then stated that as far as he was concerned the officers could enter.

Before the door was actually opened, Larson stated that he wanted everyone "to fully understand that [they] were going into his room without his consent." The officers acknowledged that they were entering without Larson's consent. Nevertheless, Schlueter, followed by Holden, then entered. Once in the room the officers saw several brown paper bags containing a white powder, which was later analyzed to be cocaine, liquor bottles, used Kleenex and a blue vest. Upon searching the contents of the bags, they placed Larson under arrest and proceeded to "process the scene."

After trial, Larson was sentenced to ten years incarceration. In June, 1985, his bond was revoked, and he began serving his sentence.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT A REGISTERED HOTEL GUEST WHO HAS PAID FOR ONE NIGHT AND COMMUNICATED HIS INTENT TO STAY OVER; WHO IS OCCUPYING HIS ASSIGNED ROOM; AND WHO IS VIGOROUSLY ASSERTING HIS RIGHT TO PRIVACY, IS NOT PROTECTED UNDER THE FOURTH AMENDMENT AS CONSTRUED IN *RAKAS V. ILLINOIS* FROM AN UNWANTED, WARRANTLESS POLICE SEARCH OF HIS ROOM. THIS HOLDING THREATENS THE PRIVACY RIGHTS OF THE ENTIRE TRAVELING PUBLIC.

This case is about hotel guests—*all* hotel guests—and their constitutional entitlement to protection from warrantless police intrusions into their rooms. In determining

that petitioner Larson lacked a reasonable expectation of privacy in his motel room when the police entered and searched it, the court of appeals held, by unavoidable implication, that none of us has a constitutionally protectable privacy interest when we are guests in hotels, except in the unusual circumstance that we have paid in full, in advance for all charges to be incurred during our stay.

The court's opinion was, however, as wrong as it was dangerous. In ruling that a guest who does not pre-pay in full loses his Fourth Amendment rights, the court applied a bright-line legal standard that directly conflicts with the case-by-case approach to Fourth Amendment problems that this Court established in *Rakas v. Illinois*, 439 U.S. 128 (1978), and ignored a set of facts and circumstances in which any reasonable hotel guest would have assumed that his privacy was fully protected.

A. A Hotel Room Is The Constitutional Equivalent Of A Home For Police-Search Purposes.

The dispositive inquiry for contemporary claims to Fourth Amendment protection is whether, under the circumstances existing at the time of a governmental search, the defendant had a reasonable expectation of privacy in the place searched. *Rakas*, 439 U.S. at 141-146. Our right to privacy within our homes and dwelling places, of course, has always received the highest degree of protection. *E.g.*, *Michigan v. Clifford*, 104 S.Ct. 641, 649 (1984); *Payton v. New York*, 445 U.S. 537, 589 (1980).

A hotel room, in which all of the personal functions of daily life are performed, is as much a citadel of privacy as a home; and a guest in a hotel or motel room enjoys the full array of constitutional protections against unreasonable searches and seizures. *E.g.*, *Johnson v. United*

States, 333 U.S. 10 (1948); *Lustig v. United States*, 338 U.S. 74 (1949); *Hoffa v. United States*, 385 U.S. 293, 301 (1966). That a guest's occupancy of the room is brief, or that he may have a permanent home elsewhere, is irrelevant. A hotel guest uses his room for personal, and frequently intimate, living activities. Thus, for constitutional purposes the room is a temporary home. The last 35 years of hotel search opinions from this Court affirm and reaffirm this principle. Likewise, the fact that hotel personnel may enter a guest's room on hotel business does not dilute the guest's privacy interests vis-a-vis the police. *United States v. Jeffers*, 342 U.S. 48, 51-2 (1951). Nor may a hotel manager take it upon himself to waive a guest's Fourth Amendment rights. *Stoner v. California*, 376 U.S. 483, 490 (1964).

B. Under *Rakas*, A Guest's Failure To Pre-Pay All Room Charges In Advance Is Not Dispositive Of His Constitutional Rights.

Had the police knocked on Larson's door 24 hours earlier, when Burgess and Larson had just arrived and Burgess had registered and paid for the room for both of them, the reasonableness of Larson's expectation of privacy would thus have been beyond dispute.[1] Larson, however, stayed over into a second day but had yet not paid for the second night's lodging, a fact the court of

[1] That someone else registered and paid for the room initially is irrelevant to the assessment of Larson's privacy interests. The room was registered to two persons, and Mr. Larson was one of them. During the initial paid-for period he was clearly a hotel guest. *See, e.g., United States v. Lyons*, 706 F.2d 321, 327 (D.C. Cir. 1983) (fact that hotel room paid for and rented for defendant by police posing as narcotics customers irrelevant to defendant's constitutional right of privacy therein).

appeals apparently found to be critical.[2] Larson's failure to pre-pay the second night's room rental cannot be determinative of his constitutional rights, however, for the circumstances clearly demonstrate that his expectation of continued occupancy and privacy was reasonable. His intent to stay over had been communicated to the assistant hotel manager in the afternoon before the police search. At 7:00 p.m., that assistant manager replied "okay" to Larson's offer to come down "in a few minutes" to pay for the use of the room for the holdover day. Larson's personal belongings had been in the room continuously and he had been in and out of the room more than once. The management had done *absolutely nothing* to counter Larson's assumption that he could continue to occupy the room for a second day. Far from informing Larson by word or action that the room was no longer his, the management *affirmatively* ratified Larson's express intent to stay over.

Despite these undisputed circumstances, the court of appeals ruled that Larson's vigorously asserted subjective expectation of privacy was unreasonable.[3] In reaching this

---

[2] The court specifically held:

> "Here, Larson's exclusive right to privacy in room 124 elapsed prior to the police search. Larson stayed in the room seven hours beyond the checkout time and five hours beyond the time he had been given permission to stay without paying for the next day's rent in advance as required by motel policy" (App. 5).

[3] Larson's subjective belief that he was entitled to keep police out of his room is undisputed. Larson had paid for the first night. He had communicated his intent to stay over, and received the hotel's confirmation before the police entered and searched his room. When the police knocked, he came out of his room, closing the door behind him. He refused to consent to any search, and indeed, insisted that the officers acknowledge that the search was

(Footnote continued on following page)

determination, the court created a bright-line rule that a hotel guest who stays over after an initial, paid-for period loses his right to privacy whenever he does not make full payment for the next night's lodging in advance.

This rule is unprincipled and its implications are frightening. The policies of hotels and motels vary widely with respect to when payments are due for stays longer than a single night.[4] All of us who frequent hotels in business and personal travels share the expectation that once an initial period has been paid for, we can go about our business, and settle all outstanding charges upon check out.[5]

Thus, common travelers would be shocked to learn that their failure to make advance payments can, standing alone, extinguish their right to privacy in rooms they have continuously used and occupied. Yet this is the court of appeals' view of the law. And indeed the implications are ominous. Where there is no constitutionally recognized right of privacy, of course, there is no requirement of

---

[3] *continued*
performed against his will and consent. Unlike the defendant in *Rawlings v. Kentucky*, 448 U.S. 98, 100 (1980), for instance, who "frankly admitted that he had no subjective expectation of privacy" in his friend's purse, Larson took steps to preserve his privacy within the room, and persisted, before and during the search, in expressing his belief that he had the right to refuse his consent to search.

[4] Expecting to pay at check-out is particularly reasonable where, as here, there were charges for long-distance calls. Items such as telephone or room service, which by their nature cannot be paid for in advance are normally settled at check-out with any unpaid room charges.

[5] Had Larson been a week-to-week tenant in a rented cottage or apartment, it is clear that non-payment of rent, without more, would not make his expectation of privacy unreasonable. *United States v. Botelho*, 360 F. Supp. 620, 624 (D. Hawaii 1973). The same rule should be applied where a hotel guest continues to occupy a room but intends to pay at check-out.

probable cause—or indeed of any cause at all—before the government can invade and search. *Katz v. United States*, 389 U.S. 347 (1967). If the court of appeals' ruling is upheld, the police would have the right randomly and with no cause to kick in the door of a honeymooning couple who have overslept the hotel's checkout time by a few minutes or to systematically break in and search the room of any business traveler—lawyer, judge, or senator—whose business forces him to extend his stay for an extra few hours but who is unable to return to the hotel to make an additional pre-payment.

Finally, this single-fact rule directly conflicts with the principled, case-by-case analysis to Fourth Amendment issues demanded by *Rakas*. There, the Court held that privacy rights are not to be determined by "arcane distinctions developed in property and tort law between guests, licensees, invitees and the like." *Rakas* at 143. Under *Rakas*, the focus is not on the defendant's contractual right to the space or his proprietary interest in the premises, but on the *reasonableness* of his privacy expectation.

Tested against the factors applied in *Rakas* and its progeny for measuring the reasonableness of a privacy expectation, Larson's expectation was manifestly reasonable. *See Rakas* at 150-154 (Powell, J., conc.); *Oliver v. United States*, 104 S.Ct. 1735 (1984); *Michigan v. Clifford*, 104 S.Ct. 641 (1984). Larson had used the hotel room as his living quarters: he had slept there, kept his possessions there, made phone calls there, performed private intimate acts there. He had taken "reasonable precautions" to maintain his privacy: he had kept his door shut and locked from the inside; he did not open it to the maid and in fact instructed her not to clean the room; nor did he later open his door voluntarily to the assistant manager or the

police. From a historical perspective, the Fourth Amendment's specific reference to "houses" includes hotel rooms. This Court has held as much. Finally, Larson did, in fact, have cognizable property and possessory interests in the room and its contents; he was present in the room at the time of the search; it was the room to which he was assigned and for which he had paid; he had slept in the room; his personal belongings including keys and clothes were there; he had the keys to the room; the assistant manager had accepted his offer to pay for the second night's lodging.

C. The Court Of Appeals Reduced The *Rakas* Analysis To A Bright-Line Test That Focuses On A Particular Hotel's Policies Instead Of The Reasonableness Of The Privacy Expectations Of Guests.

The court of appeals did not consider a single one of these facts or the *Rakas* factors for measuring reasonableness. To the court the fact, standing alone, that Larson had not pre-paid his bill in full was enough to deprive him of the protection of the Fourth Amendment, despite the reality that any reasonable hotel guest in Larson's shoes, knowing what Larson knew, would have considered that he was entitled to privacy.[6] Surely, such a result is

[6] The court of appeals cited a Second Circuit case, *United States v. Parizo*, 514 F.2d 52 (2d Cir. 1975), and others similar to *Parizo* as precedent (App. 4). But even a cursory review of those decisions indicates that the court's reliance was misplaced. In each of them the defendant was *absent* from the hotel room when the search took place and had intentionally relinquished his possession of the room. In *Parizo*, the defendant was in police custody during search, and the trial court specifically found that he had "intentionally relinquished possession" of the room. In *United States v. Haddad*, 558 F.2d 968 (9th Cir. 1977), the defendant had checked out and gone to the airport when search was made. In

(Footnote continued on following page)

not consistent with *Rakas*. In *Rakas*, the Court recast the Fourth Amendment analysis from one that focuses on a defendant's "standing" to one that focuses on the reasonableness of his privacy expectations. In so doing, however, the Court emphasized that all defendants found to have had "standing" in prior decisions, would have had "reasonable expectations of privacy" if tested under the new analysis. *Rakas* at 139. Here, it was uncontested that, as the magistrate specifically held at the suppression hearing, Larson had "standing" to invoke the Fourth Amendment. Yet, despite Larson's standing, the court of appeals held he did not have a reasonable expectation of privacy.

This summary rejection of Larson's meritorious claim to privacy is an erroneous departure from *Rakas* that

---

[6] *continued*

United States v. Croft, 429 F.2d 884 (10th Cir. 1970), and *United States v. Lee*, 700 F.2d 424 (10th Cir. 1983), *cert. denied* 103 S.Ct. 3094 (1983), the defendants were in custody during search. It was surely plain to each of those defendants, as well as everyone else involved, that under the circumstances their privacy interests in the searched rooms had evaporated. Here, in sharp contrast, Mr. Larson was present, having relinquished nothing, and vigorously asserting his right to privacy throughout the search.

The cases cited by the court are inapposite for a second reason: in each of them the expiration of the rental period prior to the challenged search was unambiguous. In *Parizo*, for instance, defendant's "vague" wish to stay over had not been communicated to hotel management; indeed he had been "checked out" of the room, and the room cleaned for a new occupant prior to the search. 514 F.2d at 53. In *Haddad*, the defendant had himself checked out of the room and gone to the airport to leave the city. 558 F.2d at 975. In *Lee* and *Croft* defendants were in custody when the rental period elapsed without their having taken any steps to retain the room. Here, Larson was occupying the room, the assistant manager knew before the police even arrived that Larson intended to stay over, and that same manager had accepted Larson's offer to come down and pay for the second night.

diverts the Fourth Amendment inquiry from the reasonableness of a guest's expectations to differing house policies of thousands of hotels and hotel managers throughout the country. This case presents an excellent opportunity for the Court to consider the important and recurring problem of the Fourth Amendment rights of hotel and motel guests; and also to create a national approach to the problem so that travelers, moving from state to state and hotel to hotel, can assess the measure of privacy to which they are entitled in their temporary homes.

II.

THE COURT OF APPEALS ERRED IN MAKING A FACTUAL "FINDING" OF EXIGENT CIRCUMSTANCES WHERE THE DISTRICT COURT MADE NO SUCH FINDING, THE OFFICERS DID NOT RELY ON EXIGENT CIRCUMSTANCES, AND NO EXIGENCY EXISTED.

As an alternative basis for denying Larson's motion to suppress, the court of appeals upheld the warrantless search of his motel room on the ground that "exigent circumstances existed making it necessary to search the room before a warrant could be obtained" (App. 6).[7] The

[7] The predicate for this alternate holding—but not for the holding on the *Rakas* issue—was that there was probable cause to conduct the search (App. 6). The court of appeals' findings on this had no basis in the record. The only information the police had about the room was the assistant manager's statement that he had found "a bag with plastic bags of white substance inside." The assistant manager, who was not known to the officers before the incident, testified that he knew nothing about narcotics: "I wouldn't recognize illegal narcotics if I saw them, but I knew it wasn't sugar and I knew it wasn't flour."

The officers did nothing to corroborate this information before entering Larson's room. In light of the assistant manager's frank and wholesale lack of knowledge and the absence of corroborative

(Footnote continued on following page)

court also made subsidiary findings of fact which purported to justify this conclusion (App. 6). But these findings and conclusion are unsupported: the district court never considered exigency, nor did it make *any* findings of fact which would support such a conclusion. Moreover, the appellate court's findings are unsupportable: the record from the suppression hearing indisputably demonstrates that the searching officers were not acting on either a subjective or objective belief that an exigency existed. Indeed, they—like the district court—never considered the question.

The court of appeals' blithe willingness to substitute hypothesized facts for the facts reflected in the record, is both erroneous and dangerous. If this decision is upheld, the core of the exigent circumstances doctrine—the police officer's actual assessment of the situation—will be eviscerated. The traditional allocation of fact- and law-finding functions between trial and appellate courts will be seriously undermined. And the exigent circumstances doctrine will be unloosed to expand to apply wherever appellate judges can postulate facts that might, if present and known to the officers, create a hypothetical exigency.

---

[7] *continued*
facts or circumstances, his report to the police did not give them probable cause to believe the white substance he had seen was contraband. *Illinois v. Gates*, 103 S.Ct. 2317, 2326 (1983) (standing alone without corroboration, an informant's tip does not provide probable cause); *Adams v. Williams*, 407 U.S. 143, 147 (1972) (uncorroborated citizen's tip is insufficient to support full-scale search).

In the event certiorari is granted, in addition to arguing the *Rakas* and exigent circumstances issues, we will argue that there was, as a matter of law, insufficient probable cause to support the search.

A. The Police Officers' Actual Belief And Judgment Is Central To The Doctrine Of Exigent Circumstances.

The rule of exigent circumstances provides the basis for a "few specifically established and well-delineated" exceptions to the Constitution's warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). Exigent circumstances exist where there is an emergency "threatening life or limb" or where there is a substantial risk to the law enforcement process if a search is delayed. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385 (1978); *Warden v. Hayden*, 387 U.S. 294 (1967); *Johnson v. United States*, *supra* 333 U.S. 10. Where the exigent circumstances exception is relied upon to justify the warrantless entry into a dwelling place, the actual circumstances underlying the entry must be examined with extra scrutiny because of the special protections the Fourth Amendment provides persons in such a place. *Welsch v. Wisconsin*, 104 S.Ct. 2091 (1985).

Up to now, the law has been that the burden is on the government to come forward with facts to demonstrate the exigency. *Vale v. Louisiana*, 399 U.S. 30 (1970); *McDonald v. United States*, 335 U.S. 451 (1948). Up to now, this Court as well as the lower courts have considered that these facts must include proof that the searching officers actually believed that an exigency existed at the time of the search, or at least would have come to that conclusion if they had had time to stop and think about it. *E.g.*, *New York v. Quarles*, 104 S.Ct. 2626 (1985); *United States v. Whitten*, 706 F.2d 1000, 1014 (9th Cir. 1983), *cert. denied* 104 S.Ct. 1593 (1984), (the searching officers "must be able to point to specific and articulable facts supporting their belief . . ."); *United States v. Wylie*, 569 F.2d 62, 67 (D.C. Cir. 1977), *cert. denied* 435 U.S. 944 (1978). The need for the search "must be readily apparent

to the police." *United States v. Brock*, 667 F.2d 1311, 1318 (9th Cir. 1982), *cert. denied* 103 S.Ct. 1271 (1983). Up to now, the reviewing court's assessment of the relevant facts and circumstances has been limited to the reasonableness of the officer's belief that exigent circumstances existed, *e.g.*, *United States v. Morales*, 737 F.2d 761, 764 (8th Cir. 1984), with reasonableness being assessed in terms of the officers' knowledge at the time of the search, not hindsight or speculation. *E.g.*, *United States v. Perez*, 700 F.2d 1232, 1237 (8th Cir. 1983), *cert. denied* 104 S.Ct. 3587 (1984).

In other words, up to now both this and the lower courts have focused the exigent circumstances doctrine on what the officers knew, when they knew it, and how they evaluated it. It is precisely because of police officers' experience that they are permitted to overcome the constitutional presumption against warrantless searches in situations where they can and do make expert, informed decisions that an emergency exists which precludes obtaining a warrant before proceeding. The officer's decision can be reviewed for reasonableness, but, because the court possesses neither the policeman's expertise nor his on-the-spot knowledge of the facts, it cannot *make* the decision in the first instance. Yet that is exactly what happened here.

B. The Police Officers Made No Subjective Judgment Of Exigency.

As the court of appeals' own statement of facts indicates, the officers who searched Larson's room thought they were performing a "management-consent" search.[8]

[8] Thus, the officers never considered whether they had probable cause to conduct a warrantless search.

After Larson declined to authorize their entrance of his room, the officers "sought consent from the motel managers" to search, and entered and searched only upon receiving that consent (App. 3).[9]

Indeed, in making its *de novo* finding that exigent circumstances did exist, the court of appeals nowhere asserts that the officers ever considered the issue of exigency or believed that an emergency existed. Instead, the court recites its *own* conclusion that there were exigent circumstances, and supports it with three facts: the room was on the ground floor; it had two entrances; and the police did not know whether anyone other than Larson was in the room. Significantly, as the government conceded in its response to Larson's Petition for Rehearing, there was no proof that the officers were even aware of the second entrance.[10] And the record clearly demonstrates that at the time of the search, the police knew that Sheila Burgess, the only other person ever known to have been in the room with Larson, had left for the airport in a taxi cab.

Thus, when the officers and assistant manager found Larson in his room, the officers testified that they "looked at each other—kind of like 'what are we going to do now?' " before knocking and identifying themselves. As their testimony reflected, they neither expressed nor bore any concern that evidence would be destroyed, that Larson would disappear, or that someone would be harmed

---

[9] Of course, as discussed in Section I, above, the manager's consent was constitutionally irrelevant, because Larson retained a legitimate expectation of privacy in the room. *Stoner v. California, supra* 376 U.S. at 490.

[10] Indeed, the government adduced facts concerning the location and entrances of the room through motel personnel, and the officers did not testify on the subject.

before a warrant could be obtained. The conclusion is inescapable: the officers did not determine that an exigent situation existed, and did not perform their search on that basis.

C. There Was No Objective Basis For Concluding That An Exigency Existed.

The basis of the court of appeals' conclusion was that the danger of destruction of evidence created an emergency. But there was nothing in the record from which it could be inferred that any such danger actually existed. Obviously, the mere fact that destructible narcotics may have been involved is insufficient to establish an exigency, because the possibility of destruction of evidence exists in every narcotics investigation. There were no other facts that, coupled with a suspicion of narcotics, could have created an objectively reasonable exigency. When the officers knocked and identified themselves, Larson came out of the room and shut the door behind him. No noise was heard from within. There were no sounds of flushing water, hasty steps, or other indications that destructive action was imminent.[11] In other words, this was not a case like *New York v. Quarles, supra* 104 S.Ct. 2626, where an appellate judge—or any other reasonable person—could conclude that an exigency existed by merely reviewing the record of testimony at the suppression hearing. To the contrary, the court of appeals' conclusion here was based on pure judicial speculation.

Moreover, and significantly, the police officers had other options—far more constitutionally palatable—than simply

[11] As discussed, it was also uncontested that the only other person known to have been involved with Mr. Larson—the woman who checked in with him—left the hotel earlier that day.

making a warrantless search. They could have "frozen" the situation by detaining Larson when he appeared outside his motel room while they obtained a warrant, telephonic or otherwise. *United States v. Sharpe*, 105 S.Ct. 1568 (1985); *Segura v. United States*, 104 S.Ct. 3380 (1984).[12] This would have avoided the constitutional issue raised, and would have allowed the officers to enter the room at any time on an emergency basis if they heard suspicious noises or activity in the room.[13]

D. When Appellate Judges Can Substitute Their Speculations For Police Officers' Judgment, The Exigent Circumstances Exception Swallows The Warrant Clause Whole.

Permitting courts of appeals to make *de novo* and wholly speculative findings on exigent circumstances presages an uncheckable and unprincipled expansion of the exigent circumstances exception; for its application will be limited only by the extent of the appellate courts' creativity.

Such a danger is not present in the superficially similar event that a reviewing court is called upon to make an initial determination as to whether probable cause existed for a warrantless search. *See, Johnson v. United States,*

---

[12] Indeed, in *Segura*, this Court drew precisely the distinction sought here between the right to preserve the *status quo* and the right to search, when it held that premises could be secured while officers, in good faith, obtained a warrant, but that absent exigent circumstances, a search would have been illegal. 104 S.Ct. at 3386-90.

[13] Such procedures are well-established and have long been upheld by this Court. *See, e.g., Rawlings v. Kentucky, supra* 448 U.S. 98 (officers detained suspects in living room of apartment for 45 minutes while warrant obtained for search); *Mincey v. Arizona, supra* 437 U.S. 385 (police guard could be stationed at entry of apartment to preserve *status quo* while warrant obtained).

supra 333 U.S. at 13-14. Indeed, a police officer's on-the-spot determination of probable cause is merely a necessary substitute for the magistrate's neutral and detached application of the law to the facts of the case. Ultimate review of the determination by a court makes the officer's on the scene conclusions largely irrelevant. Conclusions about exigent circumstances are quite different. In deciding to forego a warrant and to invade a person's personal living quarters, we insist that officers make reasoned—though speedy—decisions. We rely on their special expertise and experience in assessing emergency situations, and the judgments they make are not judicial, like a determination of probable cause, but intensely factual. That being so, a reviewing court should not "second guess" the exigencies of a Fourth Amendment situation, when the professional on the spot never made the necessary "first guess."

CONCLUSION

This case presents several significant and recurring questions of law. The "reasonable expectation of privacy" of a hotel guest, who has paid for a previous night's lodging and as to whom the management has agreed may pay for the next night's lodging, is of serious concern. The propriety of an appellate court's finding an exigency where the police officers and the trial court found none

raises important issues of judicial function.[14] For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

RAYMOND J. SMITH *
ELLEN G. ROBINSON
BURKE AND SMITH CHARTERED
55 West Monroe Street
Suite 1800
Chicago, Illinois 60603
(312) 853-3230

Attorneys for Petitioner
Duane Wendall Larson

Of Counsel:
ALAN M. DERSHOWITZ
LAURA HANFT
Harvard Law School
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4617

* Counsel of Record

[14] Even if the Court were to have doubts as to whether the exigent circumstances issue merits review, certiorari should nevertheless be granted to consider the Eighth Circuit's significant and unacceptable holding on the Fourth Amendment privacy issue, which stands alone, wholly independent from the exigent circumstances issue.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

No. 84-5080 v.

DUANE WENDALL LARSON,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

No. 84-5081 v.

SHEILA JANE BURGESS,

Appellant.

Appeals from the United States District Court
for the District of Minnesota.

Submitted: December 10, 1984
Filed: April 11, 1985

Before HEANEY, ROSS, and FAGG, Circuit Judges.

ROSS, Circuit Judge.

A jury found Duane Wendall Larson and Sheila Jane Burgess guilty on a count of an indictment which charged them with possessing three pounds of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1982), and aiding and abetting such action in violation of 18 U.S.C. § 2 (1982). The cocaine was discovered by police upon a warrantless search of a motel room in Burnsville, Minnesota.

On appeal, both defendants argue that the evidence obtained pursuant to the search should have been suppressed. The defendants also assert that the trial court violated their due process rights by refusing to grant a continuance and by failing to conduct a sufficient review of the magistrate's findings and recommendations on their motions to suppress. Finally, defendant Burgess argues that the evidence was insufficient to support her conviction, that the prosecutor failed to disclose certain evidence in violation of the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), and that her due process rights were violated in that she was not given sufficient time to prepare for trial.

We affirm defendant Larson's conviction, but reverse defendant Burgess' conviction based on the insufficiency of the evidence to support her conviction. Due to our resolution of Burgess' sufficiency of the evidence issue, we shall not address the other issues as they relate to her.

FACTS

On the afternoon of October 28, 1983, a woman rented room 124 of a Howard Johnson's motel for one night. The woman registered under defendant Burgess' name and address and advised the desk clerk that two people would be occupying the room. She paid for the room in advance, as required by motel policy.

On the morning of October 29, 1983, the woman checked out of the motel and took a taxi to the airport to pick up a car. She had received permission from William

Webster, the assistant manager, for the other occupant of room 124 to stay in the room until 2:00 p.m. The normal checkout time is noon.

At about 2:30 p.m. a maid went to clean the room, but was told by defendant Larson that "he did not want service and was staying over." The maid then informed Webster of this occurrence.

Webster sent a bellman to the room at about 5:30 p.m., since he feared that the occupant of room 124 would leave without paying for several long distance phone calls which had been made from the room. The bellman reported that the room was unoccupied.

Webster then went to examine the room himself. When no one answered the door, he entered and discovered empty liquor bottles, prescription pills, keys, and grocery bags containing plastic bags with white powder in them. After getting the motel's assistant restaurant manager to help him examine the white powder more closely, he call the motel's general manager and th police.

At about 6:40 p.m. two Burnsville police officers arrived at the motel. Webster informed them that there were several bags containing a suspicious white powder in a vacated room.

At about 7:00 p.m. Webster knocked on the door to room 124. He was about to enter, using a passkey, when he heard an answer from within the room. Webster informed the occupant that the day's rent had not been paid. Larson replied from within that "he'd be down to take care of it in a few minutes." Webster replied "okay."

The police then knocked on the door and asked to talk to Larson. After a short delay, Larson came out of the room and closed the door behind him. When Larson refused to let the officers enter the room, the officers sought consent from the motel manager. Upon receiving the manager's consent, the police entered room 124 and discovered the cocaine.

DISCUSSION

A. Motel Search

Larson moved to suppress the cocaine seized in room 124 on the ground that the search violated his fourth amendment rights. The government contends, and the district court found, that Larson failed to meet his burden of proving that he had a legitimate expectation of privacy in room 124 at the time of the search. *See Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980); *Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978).

The district court relied primarily on the decision in *United States v. Parizo*, 514 F.2d 52 (2d Cir. 1975). In *Parizo*, the court held that the admission of a sawed-off shotgun seized by a police officer from the defendant's motel room was proper since the defendant, Chester Parizo, lacked a reasonable expectation of privacy in the motel room.

The facts in *Parizo* are similar to those in this case. First, like Larson, Parizo had stayed in his motel room beyond the occupancy period without paying for the next day's rent. Second, both Larson and Parizo had informed motel employees of their intent to stay in their motel rooms for an extended period. Finally, both Larson and Parizo had their rooms searched, and their contraband seized, by police officers after motel employees had discovered their contraband.

The court in *Parizo* applied the facts as follows:

> The facts of the present case illustrate the close relationships of these conceptual bases: when the term of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel then has the right to enter the room and may consent to search of the room and the seizure of the items there found. United States v. Croft, 429 F.2d 884 (10 Cir. 1970) provides the clearest example of this point. The defendant had rented a motel room for two days. Shortly after the checkout time on the second day law enforcement officials,

> with the permission of the motel manager, searched the room and subsequently removed incriminating evidence. The court stated that the constitutional protection "is dependent on the right to private occupancy of the room. *When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it.*" Id. at 887. See, also, Abel v. United States, 362 U.S. 217, 241, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); United States v. Cowan, 396 F.2d 83 (2 Cir. 1968).

Id. at 54 (emphasis added, footnote omitted). *See also United States v. Lee*, 700 F.2d 424, 425 (10th Cir.), *cert. denied*, 103 S.Ct. 3094 (1983); *United States v. Haddad*, 558 F.2d 968, 975 (9th Cir. 1977).

We agree with the reasoning in *Parizo*. Here, Larson's exclusive right to privacy in room 124 elapsed prior to the police search. Larson stayed in the room seven hours beyond the checkout time and five hours beyond the time he had been given permission to stay without paying for the next day's rent in advance as required by motel policy. In addition, Larson had never checked into the room. Burgess had checked in but had also checked out several hours before the search. The district court's finding that Larson's communications with motel personnel were not sufficient to support a reasonable expectation of a right of privacy in the room under these circumstances is supported by the facts. Accordingly, we affirm the district court's finding that Larson lacked a legitimate expectation of privacy in room 124 at the time of the search.

In addition, even if Larson had established a legitimate expectation of privacy in the room, the warrantless search was justified under the exigent circumstances exception.[1]

---

[1] The magistrate found that exigent circumstances justified the warrantless search. The district court, however, made no findings on the issue. Instead, the court denied Larson's motion to suppress the cocaine solely on the basis that Larson lacked a legitimate privacy interest in room 124 at the time of the search.

First, the officers had probable cause, under the totality of the circumstances, to believe that contraband was located in room 124. *See Illinois v. Gates*, 103 S.Ct. 2317, 2328 (1983). Both the assistant manager and the assistant restaurant manager had closely examined the white powder in the plastic bags. In fact, they had even rubbed it between their fingers in an effort to determine what it was. Both concluded that the powder was an illegal substance. The police officers were fully informed of this conclusion, as well as other circumstances surrounding room 124, by the assistant manager upon their arrival at the motel.

Second, exigent circumstances existed making it necessary to search the room before a warrant could be obtained. Room 124 was on the ground floor and had two entrances. At the time the officers entered the room, they had no knowledge as to whether there were other occupants of room 124, as it had previously been thought that the room was vacant. Unless the officers acted quickly, there was a danger that the cocaine would be destroyed or removed from the room either by another occupant, or by Larson when the police were done questioning him. We have previously held that such an exigency removes the requirement that the police officers act with a warrant. *See, e.g., United States v. Knobeloch*, 746 F.2d 1366, 1367 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 1362 (1985); *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir.), *cert. denied*, 105 S.Ct. 332 (1984); *United States v. Kulcsar*, 586 F.2d 1283, 1286-88 (8th Cir. 1978). Accordingly, we find that the district court's denial of the motion to suppress the cocaine was proper.

B. Continuance

Larson next alleges that his due process rights were violated by the trial court's failure to grant his motion for a continuance. On January 30, 1984, two days prior to trial, Larson's attorney filed a motion for a continuance. The sole reason given for the requested delay was that

the attorney who was to present his case at trial, Oscar Goodman, was engaged in a trial in Nevada which would last approximately one week. Larson attached an affidavit explaining that each of his three sets of attorneys had been hired to perform specific tasks—one to conduct the trial, one to draft and litigate pretrial motions, and one to serve as local counsel.

The district court denied the motion on the basis that Larson had been given adequate time for trial preparation and adequate notice of the trial date.[2] The court also noted that the court had a full docket, that the court had not been informed of the division of functions amongst Larson's attorneys prior to Larson's motion for a continuance, and that Larson took a risk that his Nevada trial attorney would be engaged in a trial in that state.

On the morning of February 1, 1984, the court heard arguments on Larson's motion to withdraw appearances of all counsel other than Oscar Goodman and on a renewed motion for a continuance. The court again denied Larson's motion for a continuance. The court stated that, in addition to the previous reasons given for denial of the motion, denial was appropriate since the case was not exceedingly complex. The court also emphasized the uncertainty of when Goodman would ever be available for trial. While Goodman had previously estimated that his trial would last one week, he was now estimating that the trial would last at least two weeks.

The court also denied Larson's motion to withdraw appearance of all counsel other than Oscar Goodman. Larson refused to permit his other attorneys (specifically,

---

[2] Larson had been indicted on October 29, 1983, and arraigned on November 23, 1983. At the time of arraignment, trial was set for January 25, 1984. On January 19, 1984, the trial was rescheduled to January 30, 1984, so that objections to the magistrate's findings and recommendations, which were issued on January 19th, could be filed. Subsequently, the trial was postponed until February 1, 1984, to allow counsel to file responses to their respective objections to the magistrate's findings and recommendations.

Raymond Smith, who handled the pretrial motions) to participate in the trial on the basis that he felt Oscar Goodman could do a better job and because he did not feel that the other attorneys were prepared for the trial. After fully advising Larson of the dangers of proceeding without counsel, the court permitted Larson to proceed without counsel, but asked that the other attorneys serve as standby counsel.

It is well established that trial courts are vested with broad discretion in matters of continuances. *See Morris v. Slappy*, 103 S.Ct. 1610, 1616 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1963); *United States v. Lingo*, 740 F.2d 667, 668 (8th Cir. 1984). In *United States v. Bernhardt*, 642 F.2d 251 (8th Cir. 1981), we listed the following five factors which trial courts must weigh when exercising this discretion:

1) the nature of the case and whether the parties have been allowed adequate time for trial preparation;

2) the diligence of the party requesting the continuance;

3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance;

4) the effect of the continuance and whether a delay will seriously disadvantage either party;

5) the asserted need for the continuance, with weight to be given sudden exigencies and unforeseen circumstances.

Id. at 252. The trial court here recognized the existence of these factors, as it cited *Bernhardt* when denying Larson's motion for a continuance.

Each of the factors as applied to Larson's case indicates that Larson's motion for a continuance was properly denied. First, the case was not complex, and adequate time for trial preparation and adequate notice of the

scheduled trial date had been given. Second, the defense team exhibited a lack of diligence in that the court was not informed of Goodman's status as trial attorney, or of his scheduling conflict, until two days before trial. Third, the government did not contribute in any way to the need for a continuance. Fourth, denial of the continuance did not seriously disadvantage Larson, as he had attorneys available to him who were thoroughly familiar with his defense and competent to handle the trial. Finally, Goodman's scheduling conflict was not altogether unforeseeable. If the court had been put on notice of the problem earlier, it might have been able to accommodate Goodman's schedule. In sum, we find that the trial court did not abuse its discretion, as it had more than ample justification for denying Larson's motion for a continuance.

C. Review of Magistrate's Recommendations

Larson's final claim is that the trial judge failed to make a *de novo* review of the record of the hearing before the magistrate on the motion to suppress, or of the particular findings and recommendations of the magistrate which he objected to. This claim is primarily founded on the fact that the trial judge's order denying Larson's motion to suppress the cocaine was issued on January 31, 1984—only one day after Larson filed his objections to the magistrate's findings and recommendations and only eleven days after the magistrate's findings and recommendations were filed.

The Federal Magistrates Act provides that: "A judge of the court shall make a de novo determination of those portions of the [magistrate's] report or specified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1) (1982). In addition, the Fifth Circuit has held that constitutional concerns require that "an appellate court * * * be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely be reviewing the magistrate's report and recommendations." *United States v.*

Elsoffer, 644 F.2d 357, 359 (5th Cir. 1981). *See Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983). *See generally United States v. Raddatz*, 447 U.S. 667 (1980).

We are satisfied that the trial judge here exercised her authority properly, as her order denying Larson's motion to suppress the cocaine expressly states that she made a *de novo* review of the record and that she conducted a thorough review of all objections and responses to the magistrate's findings and recommendations.

D. Sufficiency of the Evidence (Burgess)

Burgess argues that the evidence was insufficient to support her conviction for possession of cocaine with intent to distribute and for aiding and abetting Larson in such action. To establish Burgess' guilt on the possession with intent to distribute charge, the government was required, of course, to establish Burgess' possession of the cocaine. This court has determined that the requisite possession may be either actual or constructive, and has defined constructive possession as "knowledge of presence plus control." *United States v. Caspers*, 736 F.2d 1246, 1249 (8th Cir. 1984).

To establish Burgess' guilt on the aiding and abetting charge, the government was required to establish that Burgess associated herself with the unlawful venture, that she participated in it as something she wished to bring about, and that she sought by her action to make it succeed. *Nye & Nisen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Anziano*, 606 F.2d 242, 244-45 (8th Cir. 1979). Since Burgess must have engaged in " 'some affirmative participation * * * which at least encourages the perpetrator,' " her "mere presence * * * at the scene of the crime or * * * [her] mere association with persons engaged in illegal activity is not sufficient" to establish that she was guilty of aiding and abetting. *United States v. Anziano, supra*, at 245 (*quoting United States v. Knife*, 592 F.2d 472, 476 (8th Cir. 1979)). *See United States v. Kelton*, 446 F.2d 669, 671 (8th CIr. 1971).

When reviewing the sufficiency of the evidence to uphold a guilty verdict, we apply the following principles:

> First, the court must view the evidence in the light most favorable to the verdict rendered. Second, the court must accept all reasonable inferences which tend to support the jury verdict. Third, the evidence need not "exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty."

United States v. Wells, 721 F.2d 1160, 1161 (8th Cir. 1983) (*quoting United States v. Taylor*, 599 F.2d 832, 838 (8th Cir. 1979)) (citations omitted). Applying these principles, we find that the evidence does not sufficiently establish Burgess' guilt.

The evidence against Burgess consists almost exclusively of the fact that she had checked into and stayed with Larson in the motel room from which the cocaine was later seized. But, as Burgess emphasizes, she had checked out of the motel room over seven hours before the evidence establishes that the cocaine was in the motel room.[3]

In addition to Burgess' presence at the motel room, the government attempts to use certain other circumstantial evidence to infer Burgess' guilt. First, the government points out that Burgess had familial and financial relationships with Larson, in that Larson was married to Burgess' sister and Larson had a financial interest in Burgess' two cars. According to the government, the inference to be drawn from this evidence is that Larson and Burgess are in the drug business together.

Second, the government emphasizes that Burgess had picked up a car at the airport after checking out of the

---

[3] Burgess checked out at about 10:30 a.m. The assistant manager first discovered the cocaine at about 6:00 p.m. There is no evidence as to the actual time at which the cocaine made its way into the motel room.

motel. According to the government, the inference to be drawn is that Burgess picked up the cocaine at the airport and then took it to Larson.

The government's evidence is so scant that the jury could only speculate as to Burgess' guilt. The evidence is such that a reasonably minded jury *must* have a reasonable doubt as to Burgess' knowledge of the existence of the cocaine or of her intent to aid and abet Larson's drug scheme. *See United States v. Frol*, 518 F.2d 1134, 1137 (8th Cir. 1975); *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973). Accordingly, the facts of this case require that we vacate the judgment of conviction as to Burgess.

In sum, the judgment of the district court is affirmed as to Larson and reversed as to Burgess.

A true copy.

Attest: (Signed)

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

UNITED STATES OF AMERICA,

Appellee,

No. 84-5080-MN. vs.

DUANE WENDALL LARSON,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Judge Theodore McMillian would have granted the petition.

May 31, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

UNITED STATES OF AMERICA,

Appellee,

No. 84-5080MN vs.

DUANE WENDALL LARSON,

Appellant.

Appeal from the United States District Court
for the District of Minnesota—CR 4-83-84(1)

JUDGMENT
(Filed June 18, 1985)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court.

April 11, 1985

A true copy.

ATTEST: (Signed)

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

6/13/85

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Cr. No. 4-83-84 v.

DUANE WENDALL LARSON, and
SHEILA JANE BURGESS,

Defendants.

ORDER

United States Magistrate J. Earl Cudd filed a Report and Recommendation in this case on January 19, 1984. The Magistrate recommended that defendants' motion to suppress evidence obtained pursuant to a search of a hotel room (Room 124) be denied and that defendants' motion to suppress evidence obtained following the seizure of an automobile be granted. The United States and both defendants filed objections to the Report and Recommendation by January 26, 1984. The court gave the parties until January 30 to file responses to these objections.

Defendants object to the Magistrate's recommendation that the motion to suppress evidence obtained pursuant to the search of Room 124 be denied.[1] They argue that Larson had a reasonable expectation of privacy in Room 124 when the search occurred. Among other factors, defendants assert that Larson had informed the hotel maid that he was "staying over" and that, in a discussion with the assistant hotel manager, he had agreed to pay for

---

[1] Count I of the indictment charges defendants with possession of approximately three pounds of cocaine in violation of 21 U.S.C. § 841(a)(1).

another night to which the manager replied "okay". Defendant Burgess also objects to the Magistrate's conclusion that she had no protectable privacy interest in the room.

The government objects to the Magistrate's recommendation that the motion to suppress evidence obtained following seizure of the car be granted.[2] The government argues that probable cause existed for the seizure and cites eighteen factors in support. The government also argues that the car was evidence in plain view and was therefore subject to seizure and that even if the seizure were improper, no evidence flowed from it that would taint the otherwise valid warrant because nothing contained in the affidavit came as a result of the seizure.

Based upon the court's independent determination and a de novo review of the record, including a thorough review of all objections and responses submitted, the court finds itself in basic agreement with the Report and Recommendation of the Magistrate. With respect to the seizure from Room 124, Larson did not have a reasonable expectation of privacy. Larson gave a vague indication to the hotel maid of an intention to stay over. But he neither paid in advance for a second night, as required, nor directly notified any management personnel at the motel of his alleged intention. Based on these and other factors, and paying particular attention to the decisions in *Rakas v. Illinois*, 514 U.S. 52 (1978), and *United States v. Parizo*, 514 F.2d 52 (2d Cir. 1975), the court agrees with the Magistrate that defendants' motion to suppress evidence obtained pursuant to the search of Room 124 should be denied.

The court acknowledges that less stringent Fourth Amendment standards apply to automobiles than to residences, but finds that there was no probable cause to

---

[2] The evidence obtained pursuant to the seizure of the car consists of approximately 50 grams of cocaine which forms the basis of Count II of the indictment.

seize the automobile in this case. The only connection between the automobile and the narcotics activity at the time of its seizure was that it was registered to Burgess. The "plain view" exception to the Fourth Amendment does not apply here because the automobile was not clearly incriminating evidence. *See Washington v. Chrisman*, 455 U.S. 1 (1982). The government's claim of exigent circumstances is not supported by the facts viewed as a whole. *See United States v. Chadwick*, 433 U.S. 1 (1977). In reaching its conclusion on Count II the court has also carefully considered *United States v. Place*, ___ U.S. ___, 103 S.Ct. 2637 (1983), and *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980).

Accordingly, based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that

1. Defendants' motion to suppress evidence taken from the motel room is denied.

2. Defendants' motion to suppress evidence taken from the automobile is granted.

Dated: January ___, 1984.

United States District Judge